IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 29450

SHELLEY A. MC GLOON, individually and in her capacity as guardian and natural parent of SEAN MC GLOON, a minor, and RYAN MC GLOON, a minor; and JOHN MC GLOON,	)	**Boise, February 2004 Term**
Plaintiffs-Respondents,	)	**2004 Opinion No. 61**
v.	)	**Filed: May 19, 2004**
STEFANI MICHELLE GWYNN,	)	**Frederick C. Lyon, Clerk**
Defendant-Appellant.	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Deborah A. Bail, District Judge.

The judgment of the district court is affirmed in part and vacated and remanded in part.

Elam & Burke, P.A., Boise, for appellant. Joshua S. Evett argued.

Sherer & Wynkoop, LLP, Meridian, for respondents. Stephen T. Sherer argued.

KIDWELL, Justice

This case involves a default and a default judgment. Stefani Michelle Gwynn (Gwynn) appealed from the district court's denial of her motion to set aside default, and the court's subsequent entry of default judgment against Gwynn. The judgment of the district court is affirmed in part and vacated and remanded in part.

I.
FACTUAL AND PROCEDURAL BACKGROUND

On December 1, 1999, Stefani Gwynn (Gwynn) rear-ended a car being driven by Shelley McGloon. The accident involved Shelley McGloon and her two sons, Sean and Ryan (hereinafter McGloons). Thereafter, on November 19, 2001, the McGloons filed their Verified

Complaint, which alleged, *inter alia*, negligence on Gwynn's part, and sought recovery of damages resulting from the accident.

The McGloons' counsel attempted to effectuate personal service of process on Gwynn but was not able to locate her or obtain an address at which she could be served. Unable to effectuate personal service of process, the McGloons motioned the district court for an extension of time for service by publication. The district court granted a ninety-day extension of time beyond May 19, 2002, for service of the Summons by publication in a newspaper of general circulation in Ada County, Idaho, for three consecutive weeks. At the end of the three-week period, the McGloons sought entry of default by the district court.

On July 16, 2002, pursuant to the McGloons' Application for Entry of Default and the Proof of Publication demonstrating Gwynn was served with the Summons by publication, the district court ordered and entered default against Gwynn.

On July 22, 2002, the law firm of Elam & Burke filed a "Notice of Special Appearance" stating they were the "attorneys of record for Defendant Stefani Michelle Gwynn in this action." The Notice also specified that "[t]his appearance is made solely and exclusively for the purpose of challenging the sufficiency of process and personal jurisdiction." Filed contemporaneously with the Notice of Special Appearance, was a Motion to Set Aside the Order of Default pursuant to I.R.C.P. 55(c) and 60(b), and a Motion to Dismiss pursuant to I.R.C.P. 12(b) (2), (4), and (5). The Motion to Set Aside the Order of Default reiterated the statement from the Notice of Special Appearance that Elam & Burke was appearing on behalf of Gwynn "in this action for the purpose of contesting the sufficiency of service and [did] not consent to" the district court's jurisdiction.

On August 8, 2002, counsel for the McGloons, and Elam & Burke acting on behalf of Gwynn, stipulated and agreed to set aside the district court's July 16, 2002, Order of Default. This was followed on August 15, 2002, by an order of the district court setting aside the July 16, 2002, entry of default.

On September 11, 2002, the McGloons motioned the district court for a second default against Gwynn, or alternatively for an order extending time for service by re-publication. This was supported by the affidavit of the McGloons' counsel.

On September 20, 2002, the district court entered an Order extending time for service of the Summons on Gwynn by re-publication. This Order allowed the McGloons to serve Gwynn

by re-publication of the Summons in a newspaper of general circulation in Ada County, Idaho, for four consecutive weeks. On November 12, 2002, the McGloons filed proof of publication showing publication in *The Idaho Statesman* for a period of four weeks.

On December 18, 2002, after determining Gwynn had been duly served with process by publication and that the time allowed for answering had expired, the district court signed an Order for Entry of a [second] Default against Gwynn. This was entered by the clerk of the district court on the same day.

On December 20, 2002, a Motion to Set Aside the District Court's Second Order of Default pursuant to I.R.C.P. 55(c) was filed. This Motion again reiterated that, consistent with the "Notice of Special Appearance, filed on July 22, 2002," Elam & Burke's appearance on behalf of Gwynn in the action was being made "for the purpose of contesting the sufficiency of service of process" and not to consent to the jurisdiction of the court. A hearing on this Motion was scheduled for, and held on, January 22, 2003. The district court subsequently denied the Motion to Set Aside the [second] Default and entered an Order to that effect. Thereafter, Elam & Burke filed a "Notice of Appearance and a Demand for a Jury Trial" in which they stated they were entering an appearance as the attorney of record for Gwynn.

On February 10, 2003, McGloons' counsel filed a certificate of service showing they had served Gwynn's counsel a true and correct copy of the Notice of Hearing on their motion to prove damages. Thereafter, Gwynn filed an objection to the March 5, 2003, hearing on the McGloons' Motion to prove damages.

On March 5, 2003, the district court heard the McGloons' Motion on the issue of damages. Gwynn's counsel arrived at the hearing and requested the court allow him to be heard, which the court denied because Gwynn had been defaulted out of the proceedings. On March 13, 2003, the district court entered its Judgment on the McGloons' damages. Gwynn appeals to this Court.

II.

STANDARD OF REVIEW

"On appeal, this Court exercises free review over questions of law." *Magnuson v. City of Coeur D'Alene*, 138 Idaho 166, 169, 59 P.3d 971, 974 (2002). "A court's denial of a motion to set aside an entry of default will not be reversed on appeal unless an abuse of discretion clearly appears." *McFarland v. Curtis*, 123 Idaho 931, 933, 854 P.2d 274, 276 (Ct. App. 1993). The

power of a trial court to grant or deny relief under Rule 55(c) is discretionary. *Clear Springs Trout Co. v. Anthony*, 123 Idaho 141, 143, 845 P.2d 559, 561 (1992). "Where the trial court makes factual findings that are not clearly erroneous, applies correct criteria pursuant to I.R.C.P. 55(c) to those facts, and makes a logical conclusion, the court will have acted within its discretion." *McFarland*, 123 Idaho at 933, 854 P.2d at 276.

III.

ANALYSIS

A. The District Court Did Not Abuse Its Discretion By Denying The Motion To Set Aside The Second Default.

When determining whether a motion to set aside a default should be granted, each case must be examined and considered in light of the facts presented and the circumstances surrounding the case. *Davis v. Rathbun*, 79 Idaho 482, 485, 321 P.2d 609, 610-11 (1958). Gwynn's counsel argued there was good cause to set aside the second default: first, they defended the action and expressed an intent to continue defending it; second, there was no application for default and no notice of intent to default given to Gwynn's counsel.

"For good cause shown the court may set aside an entry of default." I.R.C.P. 55(c); *Washington Fed. Sav. and Loan Ass'n v. Transamerica Premier Ins.*, 124 Idaho 913, 915, 865 P.2d 1004, 1006 (Ct. App. 1993); *Knight Ins., Inc. v. Knight*, 109 Idaho 56, 58, 704 P.2d 960, 962 (Ct. App. 1985). A party moving to set aside the entry of default must also allege facts which would constitute a defense to the action. *McFarland*, 123 Idaho at 934, 854 P.2d at 277.

In this case, good cause to set aside the second default was not established because counsel for Gwynn failed to demonstrate a defense. First, Gwynn's counsel argued they defended the action and expressed an intent to continue defending it. They support this contention by citing to I.R.C.P. 55(a)(1), which states in relevant part, "when a party against whom a judgment for affirmative relief is sought has failed to plead or *otherwise defend* as provided by these rules… the court, or the clerk thereof, shall enter default against the party." I.R.C.P. 55(a)(1) (emphasis added). Counsel for Gwynn argue they otherwise defended the action when they filed their Notice of Special Appearance and the 12(b)(2), (4), and (5) motions to have the first default set aside. This argument goes too far.

It is generally understood in other jurisdictions that the filing of a Rule 12(b) motion constitutes otherwise defending as described in Rule 55(a)(1). 10 *Moore's Federal Practice*, §

55-10[2][b] at 55-12 to 55-12.2. However, the purpose of a special appearance is to avoid having to defend on the merits or voluntarily appearing for any other reason. If a special appearance can be made solely to offer a Rule 12(b)(2), (4), or (5) motion and this is considered "otherwise defending" under Rule 55(a)(1), then it would expand that language beyond the scope of the special appearance. For example, if a party is allowed to carry over a 12(b) motion once their original purpose is complete and the special appearance over, then a party seeking default would never be able to enter a default because the defaulting party could argue they have "otherwise defended" in the action. As the district court noted when it denied the motion, once the purpose of the first special appearance was accomplished, there was nothing in the record to indicate that counsel continued to represent Gwynn. Moreover, in denying the Motion to Set Aside the [second] Default, the district court recognized the Appellant was trying to expand the scope of a special appearance when it stated:

> I do not think that the notice of special appearance which was very carefully crafted constitutes the kind of appearance that requires that the party -- that permits the parties to be served through an authorized representative, nor do I think that the type of special appearance carefully crafted, as it was, requires that there be three days' notice on the application [for default], when the special appearance was for one purpose, was to get the prior entry of default set aside.
>
> That purpose was accomplished, and there is no indication in the file that counsel continued to represent the defendant, nor was any notice of appearance in general filed in this case, so I'm going to deny the motion to set aside default.
>
> I think when it's so carefully crafted as to raise only that narrow issue of lack of personal jurisdiction, when that problem is corrected, if counsel want to indicate that they are continuing in their representation, then a notice of appearance is an easy matter to file and preserves the client and still leaves us ample room for discussion of other issues.

Based on this Court's interpretation of I.R.C.P. 55(a)(1), we find that Gwynn's counsel did not "otherwise defend" as defined in I.R.C.P. 55(a)(1) when it filed the Notice of Special Appearance and the 12(b)(2), (4), and (5) motions to have the first default set aside, because that would expand the "otherwise defended" language of I.R.C.P. 55(a)(1) beyond the scope of a special appearance.

Next, Gwynn's counsel argues the district court abused its discretion because no application for default was filed pursuant to Rule 55(a)(1), and because no notice of an intent to default was given to Elam & Burke by the McGloons prior to motioning the district court for entry of the second default. This argument fails for two reasons. First, nowhere in I.R.C.P.

55(a)(1) does it require a party moving for default to provide notice to the defaulting party of their intent to default. I.R.C.P. 55(a)(1); *Olson v. Kirkham*, 111 Idaho 34, 37, 720 P.2d 217, 220 (Ct. App. 1986). Second, I.R.C.P. 55(a)(1) does not require an "application" be made to the court for entry of default. I.R.C.P. 55(a)(1). Idaho Rule of Civil Procedure 55(a)(1) states that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the court, or the clerk thereof, shall enter default against the party." *Id*. Under Rule 55(a)(1), all that is required is that the moving party make known to the court either by "affidavit or otherwise" that the defaulting party has failed to plead or otherwise defend. *Id*. In this case, the record shows that the McGloons made it otherwise known to the district court that Gwynn failed to plead or otherwise defend when the McGloons filed with the district court their proof of publication showing publication in *The Idaho Statesman* for the requisite four week period. As such, this argument fails.

Finally, the Appellant looks to I.R.C.P. 7(b)(1) for the proposition that the application for the second entry of default should have been in writing. Rule 7(b)(1) states in relevant part that an "application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing…." I.R.C.P. 7(b)(1). As per the language of I.R.C.P. 7(b)(1), an application can be written or oral. Here, the district court noted that subsequent to the re-service by publication in the Idaho Statesman, "an order for default was requested and entered." As such, the Appellant's argument fails because the record reflects that an Order for Default was requested and entered.

In sum, the district court did not abuse its discretion when it denied the motion to have the second default set aside because Gwynn's counsel did not show good cause by establishing a defense.

B. The Judgment Of The District Court Is Void.

In Idaho, a court may set aside a judgment by default in accordance with I.R.C.P. 60(b). I.R.C.P. 55(c). "[W]hen a default judgment is predicated upon an erroneously entered default, the judgment is voidable." *Knight Ins.*, 109 Idaho at 59, 704 P.2d at 963. Voidness of a judgment under I.R.C.P. 60(b)(4) creates a nondiscretionary entitlement to relief. *Dragotoiu v. Dragotoiu*, 133 Idaho 644, 647, 991 P.2d 369, 372 (1998); *Knight Ins.*, 109 Idaho at 59, 704 P.2d

at 963. Where nondiscretionary grounds are asserted, the question presented is one of law upon which this Court exercises free review. *Id*.

Under I.R.C.P. 60(b)(4), "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding…[if] the judgment is void." I.R.C.P. 60(b)(4). For a judgment to be considered void under I.R.C.P. 60(b)(4), there generally must have been some jurisdictional defect in the court's authority to enter the judgment, because the court lacked either personal jurisdiction or subject matter jurisdiction. *Puphal v. Puphal*, 105 Idaho 302, 306, 669 P.2d 191, 195 (1983); *Dragotoiu*, 133 Idaho at 647, 991 P.2d at 372. Additionally, a judgment is void when a court's action amounts to a plain usurpation of power constituting a violation of due process. *Dragotoiu*, 133 Idaho at 647, 991 P.2d at 372. The right to procedural due process guaranteed under both the Idaho and United States Constitutions requires that a person involved in the judicial process be given meaningful notice and a meaningful opportunity to be heard. *Id*. at 648, 991 P.2d at 373 (citing *Rudd v. Rudd*, 105 Idaho 112, 115, 666 P.2d 639, 642 (1983)). Each of Elam & Burke's arguments as to why the default judgment of the district court is void will be addressed below.

1. I.R.C.P. 5(a) was not violated.

Idaho Rule of Civil Procedure 5(a) provides that:

> Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, brief and memorandum of law, and similar paper shall be served upon each of the parties affected thereby, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

I.R.C.P. 5(a).

Gwynn argues the Default Judgment of the district court is void because the McGloons' counsel violated Gwynn's procedural due process rights as provided by I.R.C.P. 5(a) when they failed to serve all papers filed in this action on Elam & Burke after they "specially appeared on Ms. Gwynn's behalf on July 22, 2002."

First, Elam & Burke was not a party as described in I.R.C.P. 5(a) once the purpose of their "special appearance," which was to have the first Default set aside, was accomplished,

because they were no longer technically representing a party under I.R.C.P. 5(a). As such, they were not entitled to receive service of process on behalf of Gwynn, the party to the action. This conclusion is reinforced by Elam & Burke's admission in the transcript of the Hearing to Set Aside the Second Default that they were not authorized to receive service of process for Gwynn.

Because Elam & Burke admitted they were not authorized to receive service on behalf of Gwynn, the McGloons were not required to mail copies of documents to Elam & Burke subsequent to the setting aside of the first Default and prior to the entry of the second Default. As the district court noted, the mailing of copies of documents would be a "florid sort of courtesy rarely seen in modern litigation."

Additionally, under I.R.C.P. 5(a), once the second Default was entered against Gwynn, neither she nor Elam & Burke was entitled to receive documents listed in I.R.C.P. 5(a) because "no service need be made on parties in default for failure to appear." I.R.C.P. 5(a). Finally, there is nothing in I.R.C.P. 55(a)(1) that requires a party moving to default another to provide notice of their intent to default. I.R.C.P. 55(a)(1); *Olson*, 111 Idaho at 37, 720 P.2d at 220. Since all of the documents filed subsequent to the setting aside of the first Default and prior to the second Default dealt with having a second default entered against Gwynn for failing to answer or otherwise defend the action, she was not entitled to receive them; nor was Elam & Burke. Therefore, there was not a Rule 5(a) violation as Gwynn asserts.

2. I.R.C.P. 4(e)(1) was not violated.

Idaho Rule of Civil Procedure 4(e)(1) provides in relevant part that whenever the summons is served by publication, "copies of the summons and complaint shall be mailed to the last known address most likely to give notice to the party." I.R.C.P. 4(e)(1). Gwynn argues Elam & Burke "obviously [were] the party to whom a copy of the summons and complaint should have been sent under Rule 4(e)(1) when service was again attempted by publication."

This argument fails for two reasons. As concluded above, Elam & Burke was not authorized to receive service for Gwynn and, therefore, service of the Summons and Complaint on them would not have effectuated service under Rule 4(e)(1). Second, the McGloons' agent personally visited Gwynn's former landlord, her former place of employment, and contacted her parents, all without obtaining an address likely to provide notice to Gwynn. Thus, with no mailing address, the best the McGloons could do in notifying Gwynn of the action was to substantially comply with the rule by publishing the Notice for the requisite amount of time,

which they did. *Mills v. Smiley*, 9 Idaho 317, 76 P. 783 (1904); *McKnight v. Grant*, 13 Idaho 629, 92 P. 989 (1907) (substantial compliance with rule is all that is required)(decision under prior rule). While this Court recognizes that "substantial compliance" is not allowed under the current version of I.R.C.P. 4(e)(1), we find that based on the specific facts of this case, there was not a Rule 4(e)(1) violation because the McGloons went beyond what is required to serve process by personally visiting Gwynn's former landlord, her former place of employment, and contacting her parents. This case does not stand for the broad proposition that a party can comply with Rule 4(e)(1) even though the party does not mail "copies of the summons and complaint… to the last known address most likely to give notice to the party." I.R.C.P. 4(e)(1). However, given the specific facts of this case, we find that the McGloons did all they could to comply with the rule by serving notice through publication. Therefore, this Court finds there was not a Rule 4(e)(1) violation.

Moreover, even if the McGloons did not substantially comply with Rule 4(e)(1), any error would be harmless error because it was impossible to mail the Summons and Complaint when there was no last known address for Gwynn since the McGloons' agent had personally gone to the last known address and discovered Gwynn no longer lived there. As discussed above, the McGloons were not able to obtain an address for Gwynn. Further, as discussed above, because the only appearance Elam & Burke made in the action was a special appearance, and they refused to accept service of process on behalf of Gwynn, Elam & Burke was never a known address likely to give Gwynn notice. It is true Elam & Burke knew how to contact Gwynn; yet, they refused to disclose her whereabouts to the McGloons. Nevertheless, Elam & Burke admitted it was not entitled to receive process for Gwynn and its address is not where Gwynn resides. As such, it is not a known address for Gwynn because, by not being entitled to receive process, there is no guarantee Gwynn would receive notice if the McGloons mailed a copy to Elam & Burke. Therefore, even if the McGloons' failure to mail a copy of the Summons and Complaint pursuant to I.R.C.P. 4(e)(1) was error, it was harmless error because there was no last known address likely to give Gwynn notice.

3. Failure to allow Gwynn to participate in the damages hearing renders the default judgment void.

A party in default admits all well-pled factual allegations in the complaint. *Cement Masons'-Employers' Trust v. Davis*, 107 Idaho 1131, 1132, 695 P.2d 1270, 1271 (Ct. App.

1985). Gwynn does not dispute the well-pled allegations in the Complaint; rather, she argues she was entitled to participate in the damages hearing. Idaho case law does not provide guidance as to whether a party in default is entitled to be heard at a damages hearing for unliquidated damages. The federal courts, however, do provide some guidance.

As a general rule in other jurisdictions, a defaulting defendant is entitled to contest damages and to participate in a hearing on damages, should one be held. *Bonilla v. Trebol Motors Corp.*, 150 F.3d 77, 82 (1st Cir. 1998); *Dundee Cement Co. v. Howard Pipe & Concrete Products, Inc.*, 722 F.2d 1319, 1323 (7th Cir. 1983); *United Artists Corp. v. Freeman*, 605 F.2d 854, 857 (5th Cir. 1979); 10 *Moore's Federal Practice*, § 55.23[3], at 55-41-55-42 (Coquillette et al. eds., 3rd ed. 1997). Also, the right to procedural due process guaranteed under both the Idaho and United States Constitutions requires that a person involved in the judicial process be given a meaningful opportunity to be heard and meaningful notice. *Dragotoiu*, 133 Idaho at 648, 991 P.2d at 373 (citing *Rudd v. Rudd*, 105 Idaho 112, 115, 666 P.2d 639, 642 (1983)).

In this case, Gwynn was entitled to participate in the damages hearing because her counsel appeared on behalf of Gwynn when it filed the Notice of Appearance/Demand for Jury Trial two days after the district court denied its Motion to Set Aside the [second] Default. Pursuant to the rule in *Bonilla*, Gwynn was entitled to be at the hearing, which would include her counsel. Moreover, since Gwynn's counsel appeared, it was entitled to notice of the change in start time for the damages hearing, and the failure of the district court to notify it of this violated Gwynn's due process rights, thereby warranting setting aside the Default Judgment. As such, because the district court held the damages hearing without allowing Gwynn's counsel to participate, even though it showed up at the hearing and sought to participate, the district court denied Gwynn her procedural due process right to be heard. Moreover, because counsel for Gwynn appeared on her behalf once the Motion to Set Aside the second Default was denied, it was entitled to be notified of the time change. Therefore, the district court's action in denying Gwynn's counsel access and not notifying it of the change in start time for the hearing amounted to a violation of Gwynn's due process rights, rendering the Judgment of the district court void. *Dragotoiu*, 133 Idaho at 647, 991 P.2d at 372.

IV.

CONCLUSION

The Judgment of the district court is affirmed in part and vacated and remanded in part. The district court's denial of the Motion to Set Aside the [second] Default was not an abuse of discretion because Gwynn failed to show a defense amounting to good cause. Because Gwynn's counsel was not a party to the action once the purpose of its special appearance was accomplished, I.R.C.P. 5(a) was not violated. There was not an I.R.C.P. 4(e)(1) violation in this case because there was no last known address likely to give Gwynn notice, and because the specific facts of this case show the McGloons went beyond what is required to serve process by publication. Because this Court adopts the general rule that a defaulted defendant, upon proper appearance or further needed compliance with Idaho Rules of Civil Procedure, is entitled to participate in damages hearings, the Default Judgment of the district court is void on the ground that Gwynn was entitled to participate in the damages hearing. This Court vacates and remands the Default Judgment for a new hearing only on the amount of damages to be awarded to the McGloons. Because the district court is affirmed in part and vacated and remanded in part, there is no prevailing party. As such, neither party is entitled to costs.

Justices SCHROEDER and BURDICK **CONCUR**.

Justice Pro Tem JUDD, **DISSENTING**:

I respectfully dissent from section B 2 of the court's opinion that I.R.C.P. 4(e)(1) was not violated. I would hold that the judgment against Gwynn was void as the court never acquired jurisdiction over her person.

Service of process is the due process procedure that vests a court with jurisdiction over a person, that is, with the power to require such person to comply with the court's orders. The U.S. Supreme Court has indicated that due process in this context is

> notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (Citations). The notice must be of such nature as reasonably to convey the required information, * * * and it must afford a reasonable time for those interested to make their appearance. (Citations).

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 70 S.Ct. 652, 657, 94 L.Ed. 865, 873. The *Mullane* court also made constructive comments on the sufficiency of service by publication alone. It stated at 339 U.S. 315, 70 S. Ct. 658 that

> It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed.

In order to provide a method of constructive service that meets the due process requirements of notice, this Court has adopted I.R.C.P. 4(e)(1) which provides in pertinent part:

> Whenever the summons, notice or order is served by publication it shall contain in general terms a statement of the nature of the grounds of the claim, and copies of the summons and complaint **shall be mailed** to the last known address most likely to give notice to the party. (Emphasis added).

In resolving a constitutional challenge to personal jurisdiction based upon constructive service and with deference to *Mullane*, *supra*, this Court in *Evans v. Galloway*, 108 Idaho 711, 713, 701 P.2d 659, 661 (Idaho 1985) held

> that, for persons engaged in actionable conduct who subsequently move leaving no forwarding address by which their whereabouts may be determined, service of summons by publication in a newspaper of general circulation in the area, and a mailing of copies of the summons and complaint to that party's last known address is reasonably calculated under all the circumstances to apprise that party of the pendency of an action.

The majority excuses McGloons' failure to comply with the mandatory mailing provisions of I.R.C.P. 4(e)(1) on the basis that "McGloons went beyond what is required to serve process by personally visiting Gwynn's former landlord, her former place of employment, and contacting her parents," "all without obtaining an address likely to provide notice to Gwynn." This conclusion is contrary to the statement by McGloons' counsel in the Application For Entry of Default filed on July 8, 2002 that

> The last known address of the Defendant (Gwynn) against whom default is sought was 326 W. Idaho Ave., Apt. A., Meridian, Idaho 83642.

This statement appears to have been made in compliance with I.R.C.P. 55(b)(1) which provides in part

> Any application for a default judgment must contain written certification of the name of the party against whom judgment is requested and the address most likely to give the defendant notice of such default judgment, and the clerk shall use such address in giving such party notice of judgment.

This address, which was certified as most likely to give notice of any default judgment, surely should be the address most likely to give notice of the pending suit for purposes of acquiring jurisdiction of the person pursuant to I.R.C.P. 4(e)(1). Nevertheless, McGloons failed to mail copies of the summons and complaint to Gwynn.

The majority opinion, Part B. 1., correctly decides that McGloons were not **required** to send copies of the summons and complaint to Elam & Burke. The knowledge of McGloons' counsel that Elam & Burke had Gwynn's address and would appear for her, once she was properly served, provided a basis to justify that Elam & Burke's address was "the last known address most likely to give notice" to Gwynn. Although not required, McGloons' mailing of the copies to Elam & Burke would not have been a "florid sort of courtesy rarely seen in modern litigation" but rather a good faith attempt to meet I.R.C.P. 4(e)(1)'s due process notice requirement that "copies of the summons and complaint shall be mailed to the last known address most likely to give notice to the party." Instead, McGloons made no effort to comply with the requirement[1] and chose to not mail copies to anyone, in what appears to be an attempt to obtain a default judgment rather than a determination on the merits.

The Court's acceptance of McGloons' total non-compliance with the mandated mailing requirement of I.R.C.P. 4(e)(1) will open the door to trial and appellate courts having to address in future cases whether other plaintiffs have as the Court finds "that the McGloons did all they could to comply with the rule by serving notice through publication.

I dissent.

Chief Justice TROUT, **CONCURS IN DISSENT**.

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[1] McGloons made no attempt to comply with the mailing requirement on either of the publications.